Supreme Court, U. S.
FILED
MAY 19 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1677

HUGH CAREY, individually and as Governor of the State of New York; ARTHUR H. SCHWARTZ; REMO J. ACITO; DONALD A. RETTALIATA and WILLIAM H. McKEON, individually and as Commissioners of the New York State Board of Elections,

Petitioners,

against

ANTONIA ECHEVARRIA, individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutory Provision Involved	2
Statement of the Case	3
Reasons for Granting the Writ	3
Conclusion	6
Appendix A	1a
Appendix B	3a
Appendix C	5a

Table of Authorities

Cases:

Rosario v. *Rockefeller*, 410 U.S. 752 (1973) 2, 3, 4, 5

McDonald v. *Board of Election Commissioners*, 394 U.S. 802 (1969) 4

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 4, 5

Neale v. *Hayduk*, 35 N.Y. 2d 182, 359 N.Y.S. 2d 542, 316 N.E. 2d 861 (1974) app. dism. 420 U. S. 915 .. 5

Ortner v. *Board of Elections*, 74 Civ. 3416, S.D.N.Y. (September 9, 1974) 5

PAGE

Feinstein v. *Carey*, 76 Civ. 1392 (3/29/76) affd. U.S. Ct. of Appeals, 2d Circuit, April 1, 1976 (Doc. 76-8127, Slip Opin. p. 2865) 5

Statutes:

28 U.S.C. Section 1254(1) and (2) 1

New York Election Law,

§ 186 ..... 2, 3, 4, 5

§ 187 ..... 4, 5

IN THE

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No. 75-.....

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Hugh Carey, individually and as Governor of the State of New York, Arthur H. Schwartz, Remo J. Acito, Donald A. Rettaliata and William M. McKeon, individually and as Commissioners of the State Board of Elections, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered herein on February 25, 1976.

Opinions Below

The District Court opinion is reported below at 402 F. Supp. 183. The judgment of the Court of Appeals (1a)* affirmed the District Court on the opinion of Judge Weinfeld (5a). That opinion declared Section 186 of the New York Election Law, insofar as they are applied to persons establishing residency in New York from outside the State, to be an unconstitutional *durational* residency requirement.

Jurisdiction

The judgment of the Court of Appeals was entered on February 25, 1976. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and (2).

Question Presented

Whether the judgment of the Court of Appeals, affirming the judgment on the decision of the District Court declaring Section 186 of the Election Law (which applies to eligibility to vote in a primary election) unconstitutional, conflicts with this Court 's opinion in *Rosario* v. *Rockefeller,* 410 U.S. 752 (1973), and in any event is based on mandatory constitutional principles?

Statutory Provision Involved

New York Election Law

> "§ 186. *Opening of enrollment box and completion of enrollment.* All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year . . ." (In pertinent part)

* Numbers in parentheses refer to pages of the appendix hereto.

Statement of the Case

The Court of Appeals for the Second Circuit affirmed the judgment herein of the District Court for the Southern District of New York, declaring New York Election Law, Section 186 to be unconstitutional.

The respondent moved to New York City in January, 1975, from Puerto Rico. On March 4, 1975 she registered to vote and enrolled in the Democratic Party. Because the respondent registered to vote after the November, 1974 general election, the effect of Section 186 was to defer the enrollment of the respondent until after the next party primary. She could not therefore participate in the Democratic primary in September, 1975. (This provision of course has no application to the eligibility to vote in the general election.)

The District Court granted summary judgment to the respondent, finding Section 186 unconstitutional as an impermissible durational residency requirement, as applied to the situation of respondent. Class action relief was also granted.

Reasons for Granting the Writ

The Court of Appeals for the Second Circuit, in affirming the judgment of the District Court, has reached a result contrary to this Court's ruling in *Rosario* v. *Rockefeller,* 410 U.S. 752 (1973), as to eligibility to vote in the party primary election. In that case this Court held that Section 186 is constitutional and that the State ". . . is certainly justified in imposing some reasonable cut off point for registration or party enrollment, which citizens must meet in order to participate in the next election". Id. 760. The prevention of party raiding or preservation of the integrity of the electoral process is a "legitimate and valid state goal". Id. at 761. It is clear that this

rationale applies as well to any prospective enrollee who does not fit any of the enumerated exceptions contained in Election Law, § 187, regardless of circumstances. New York, having a valid regulation of the party process in § 186, *Rosario* v. *Rockefeller, supra,* need not provide for all possible exceptions. *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969).

Despite this holding, the Courts below relied on *Rosario, supra,* at footnote 9, to reach an opposite conclusion with respect to voters arriving from out-of-state. All footnote 9 said was that a *claim* that Section 186 was a durational residency requirement—unconstitutional under *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), could not be maintained by petitioners who made no claim that they were recently arrived residents. There was no finding § 186 was such a requirement. Yet the District Court opinion blindly assumed that Section 186 was a *durational* residence requirement (6a). In fact it is not, and *Dunn, supra, has* no application, since the respondent was in the same position when she came to New York as any other citizen who had failed to enroll prior to the preceding general election, regardless of the citizen's length of residence. The requirement has nothing to do with durational residential requirements.* In New York *all* citizens receive equal treatment as to the time party enrollment must be effected. Section 186 does not bar newly arrived residents, as opposed to long-time residents, from voting. The deferred enrollment is based on the preceding general election to avoid party raiding shortly before the primary. The considerations for this was pointed out in *Rosario.*

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* In the Court of Appeals opinion in *Rosario* (458 F. 2d 649), the court (at 652) pointed to the prevention of "raiding" as "a compelling State interest", after discussing the efficacy of protecting the party system in the democratic process against "raiding" which could result "in practical effect" as "a fraudulent candidacy". New York has not adopted the "cross-over" primaries as in Texas, where voters of another party can cross-over and determine the candidate of a party.

In presenting the claim that because she was a newly arrived out-of-stater, respondent was deprived of her constitutional rights, the issue really revolved around application of N. Y. Election Law, Section 187, which provides several exceptions to Section 186. The respondent would have been entitled to a special enrollment, valid for the September, 1974, primary, under Section 187, subd. 2(c) if it were not for the limitation of subd. 6 (". . . special enrollment is restricted to the same county the voter resided in at the preceding year"). Thus Echevarria, as did the petitioners in *Neale* v. *Hayduk,* 35 N.Y. 2d 182, 359 N.Y.S. 2d 542, 316 N.E. 2d 861 (1974), app. dism. (for failure before notice of appeal on time) 420 U.S. 915 (1975), should have been held to be challenging Section 187(6). The opinion below in substance ignores Section 187.

The New York State Court of Appeals has upheld the constitutionality of Section 187 in *Neale* v. *Hayduk, supra,* and came to a diametrically opposite result to the courts below. As a result, New York State residents who move from one county to another outside of New York City are restricted by the durational requirement of Section 186 through the action of Section 187, subd. 6 while, anomalously a non-New York State resident arriving in the State after the general election, has complete freedom to switch parties by virtue of the judgment below. The constitutionality of these sections as applied to county-to-county movers within New York State has also been upheld as well in *Ortner* v. *Board of Elections,* 74 Civ. 3416, S.D.N.Y., (September 9, 1974); and *Feinstein* v. *Carey,* 76 Civ. 1392 (3/29/76) affd. U.S. Ct. of Appeals, 2d Circuit, April 1, 1976 (Doc. 76-8127, Slip Opin. p. 2865).

It is patent that the decision below not only misreads *Rosario* but also misconceives the durational residence requirement discussed in the *Dunn* v. *Blumstein* case (405 U.S. 330) which has no application here.

New York is not constitutionally required to open its party primary. Judgments as to who constitutes a danger

of "raiding" (13a-14a) and how to protect the primary process, as engaged in by the District Court, are for the legislature. *Rosario* v. *Rockefeller, supra,* 410 U.S., at 762, ftn. 10.

CONCLUSION

The writ of certiorari should be granted and the judgment of the Court of Appeals reversed.

Dated: New York, New York, May 10, 1976

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of February one thousand nine hundred and seventy-six.

Present:

HONORABLE WILFRED FEINBERG
HONORABLE JAMES L. OAKES
HONORABLE ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

No. 75-7537

ANTONIA ECHEVARRIA, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

—against—

HUGH CAREY, individually, and as Governor of the State of New York, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix A.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Weinfeld, dated August 29, 1975.

WILFRED FEINBERG

JAMES L. OAKES

ELLSWORTH A. VAN GRAAFEILAND
U. S. C., JJ.

APPENDIX B

Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the pleadings, plaintiff's motion for summary declaratory judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and plaintiff's motion for certification of this action as a class action pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure, and the Opinion of the Court dated August 29, 1975,

IT IS HEREBY ADJUDGED THAT, plaintiff's motion for certification of this action as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure is granted, and the class is certified as consisting of all New York State residents recently arrived from out-of-state who could not have enrolled timely in the Democratic Party because they do not meet the residency requirements imposed by New York Law and who have acquired, or will acquire voting residence, but who are barred, or will be barred, nevertheless, from voting in future Democratic primary elections by the operation of Section 186 of New York's Election law; and it is,

FURTHER ODERED, ADJUDGED, AND DECREED, that plaintiff's motion for a declaratory judgment is granted, and it is hereby declared that as applied to plaintiff Antonia Echevarria and the class members she represents, New York Election Law § 186 (McKinney 1964) read together with New York Election Law § 187 as applied to plaintiff and

the members of the class she represents abridges their right to participate in the electoral process, impinges upon their right to travel, and denies them equal protection of the laws in violation of the First and Fourteenth Amendments to the Constitution of the United States, and is declared unconstitutional; and

UPON, the State defendants' application for a stay of this judgment, and the representations of the office of the Attorney General of the State of New York, acting *pro se* and as counsel for the State defendants, that (1) with respect to the September 9, 1975 primary elections it appears administratively impossible in view of the time constraints to observe the Court's judgment without creating confusion at the polls and increasing the likelihood of challenges to the election results, (2) it will file a notice of appeal from this judgment no later than September 15, 1975 and stipulate to expeditiously prosecute the appeal thereafter, and (3) it will advise the State defendants to inform local election officials to take preliminary steps necessary to assure subsequent observance of the Court's judgment if affirmed, and

UPON, the consent of plaintiff's counsel given pursuant to the aforesaid representations, it is hereby,

ORDERED, that the judgment of this Court be stayed for ten (10) days.

Dated: New York, New York
September 8, 1975

/s/ EDWARD WEINFELD
EDWARD WEINFELD
United States District Judge

APPENDIX C

Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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Edward Weinfeld, D. J.

Plaintiff challenges the validity of section 186 of New York State's Election Law[1] as applied to her and others of her class. Plaintiff acquired voting residence in New York after the November 1974 general election, thereby entitling her to vote in the oncoming election in November 1975; however, section 186, which requires that voters must have enrolled in a party at least thirty days prior to the last general election in order to vote in the following primary, in effect forecloses her from voting in the primary election to be held on September 9, 1975. The issue—whether section 186 so applied imposes an unconstitutional durational residence requirement—was before the Supreme Court in *Rosario* v. *Rockefeller*[2] but was not passed upon since the

[1] N. Y. Elec. Law § 186 (McKinney 1964): *"Opening of enrollment box and completion of enrollment*

> All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. • • •"

[2] 410 U.S. 452, 459 n.9 (1973).

Appendix C.

Court found that plaintiff in that action lacked standing to raise it.

The parties agree that upon the facts here presented, the matter is ripe for summary judgment determination. The plaintiff moves for such relief pursuant to Rule 56 and also for a class action certification pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.[3]

Plaintiff resided in New York City for sixteen years from 1951 through October 1967, during which period she was a registered voter and enrolled as a member of the New York State Democratic Party. In October 1967, she moved to the Commonwealth of Puerto Rico where she remained until January 1975, when she returned to New York City and again took up residence there. On March 4, 1975, she registered to vote[4] and enrolled in the Democratic

[3] Plaintiff alleges she represents:

> "(a) the class of New York voters who could not have enrolled in the Democratic Party at the time of the November, 1974 general election because they did not meet the residence requirements imposed by New York law and who have since acquired voting residence, but who are, nevertheless, barred from voting in the 1975 Democratic Primary by the operation of Section 186 of New York's Election law, and (b) the class of all recently arrived New York State residents who could not have enrolled timely in the Democratic Party because they do not meet the residency requirements imposed by New York law and who will acquire voting residence, but are barred, nevertheless, from voting in future Democratic primary elections by the operation of Section 186 of New York's Election law."

[4] N. Y. Elec. Law § 150 (McKinney Supp. 1975) in pertinent part provides:

> "A person is a qualified voter in any election district for the purpose of having his or her name placed on the register if he or she is or will be on the day of the election qualified to vote at the election for which such registration is made. A qualified voter is a citizen who is or will be on the day of election eighteen years of age or over, and shall have been a resident of this state, and of the county, city or village for three months next preceding an election and has been duly registered in the election district of his residence. • • •"

Party at the central office of the Board of Elections in New York City. She was then informed by a representative of the Board of Elections that she was ineligible to participate in the New York State Democratic primary to be held on September 9, 1975, because she was not an enrolled member of the party as of thirty days prior to the November 1974 general election.

Section 187 of the New York State Election Law contains a special enrollment provision which permits one who acquired the necessary residential requirements after the last general election to enroll, but subdivision 6 of section 187 restricts such special enrollment "to the same county the voter resided in at the preceding year."[5] While a surface reading of the restriction "to the same county the voter resided in at the preceding year" suggests that it is inapplicable to plaintiff and others of her class, who were not residents of the state at the last preceding general election and who therefore could not have been registered or enrolled in any county of the state, the New York State Court of Appeals has upheld a lower court ruling that subdivision 6 of section 187 also applies to out-of-state residents

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[5] N. Y. Elec. Law § 187 (McKinney 1964) provides:

"1. At any time after January first and before the thirtieth day preceding the next fall primary, • • • a voter may enroll with a party, transfer his enrollment after moving within a county, • • • as hereinafter in this section provided.

"2. A voter may enroll with a party if he did not enroll on the day of the annual enrollment • • • (c) because he did not have the necessary residential qualifications • • • to enable him to enroll in the preceding year • • •.

• • •

"6. Special enrollment under the classification set forth in clause (c) of subdivision two is hereby expressly limited to a voter otherwise qualified, who did not have the qualifications to vote at the previous general election and such special enrollment is restricted to the same county the voter resided in at the preceding year."

who arrive here after the cutoff date.[6] This Court, of course, is bound by that ruling.[7]

Thus the Court's inquiry is directed to section 186, which in substance provides that, for a registered voter to participate in a party's primary, he must enroll at least 30 days before the general election by depositing his enrollment blank in a locked enrollment box which is not opened until the Tuesday following the general election when his enrollment is entered on the official registration books. Since plaintiff was not a resident of New York State in November 1974, she was not eligible to vote at that election and there was no way for her to register or enroll in any party thirty days before that election as required by section 186. Having met residency requirements after the November 1974 election, she was duly registered and is now entitled to vote at the oncoming general election to be held in November 1975. But, under New York's interpretation of sections 186 and 187, she is barred from voting in the September primary, even though at that time she will have been enrolled as a member of the Democratic Party since March 1975. The earliest primary she will be eligible to vote in is the presidential primary in 1976.

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[6] Jordan v. Meisser, 29 N.Y.2d 661 (1971), *appeal dismissed*, 405 U.S. 907 (1972).

[7] O'Brien v. Skinner, 414 U.S. 524, 531 (1974); Gooding v. Wilson, 405 U.S. 518 (1972); United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971); Commissioner v. Estate of Bosch, 387 U.S. 456, 464-65 (1967). It has also been held that the construction placed upon a statute by a state's intermediate appellate court which was left undisturbed—though not specifically passed upon—on appeal to the state's highest court is similarly binding on the federal courts. Thorington v. Cash, 494 F.2d 582, 587 (5th Cir. 1974). *Cf.* Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 364 F.2d 957 (5th Cir. 1966). This is the situation in the instant case.

Accordingly, plaintiff seeks a declaration that defendants' refusal, under color of sections 186 and 187, to permit her and members of her class to participate in the September 1975 primary election is an unconstitutional durational residence requirement which abridges their right to participate in the electoral process, impinges upon their right to travel, and denies them equal protection of the laws in violation of the First and Fouurteenth Amendments to the Constitution of the United States and Article IV, section 2 thereof.[8] The issue is confined to plaintiff and other newly established residents of the state who, lacking the necessary residential qualifications, could not have voted at, or enrolled in a party prior to, the last general election, but who thereafter having attained the required residential qualifications are entitled to vote at the next general election, but nonetheless foreclosed from voting in the primary preceding that general election. The net effect of sections 186 and 187 as applied to plaintiff and members of her class is to impose a durational residency requirement of up to eleven months in order to be eligible to vote in the September 1975 primary election.[9]

The right to vote in a primary election is as important as the right to vote in a general election and as such is

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[8] Upon the argument of this motion, plaintiff withdrew her request for an injunction directing the defendants to permit her to participate in the 1975 primary elections, and expressly limited her claim to a declaratory judgment. Under this circumstance, the Court is not called upon to consider convening a three-judge court under 28 U.S.C. § 2281 (1970), but is empowered to determine the constitutional issue. *See* Mitchell v. Donovan, 398 U.S. 427 (1970); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Rosario v. Rockefeller, 458 F.2d 649, 651 n.2 (2d Cir. 1972), *aff'd*, 410 U.S. 452 (1973), and cases cited therein.

[9] The plaintiff, in order to have been enrolled as of the November 1974 general election so as to qualify to vote in the ensuing primary, would have had to register and complete her enrollment prior to October 10, 1974, the last day of registration in New York City.

similarly protected against state action.[10] As recently stated by the Supreme Court:

> "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activities' protected by the First and Fourteenth Amendments. * * * The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom"[11]

and clearly encompasses the right to vote in primary elections.

It cannot be seriously challenged that the period between the cutoff date for enrollment—at least thirty days prior to a general election and the ensuing primary election in the following year—eleven months in the instance of plaintiff and those of her class, is "lengthy."[12] The practical effect of sections 186 and 187 as applied to plaintiff is to work an absolute bar on plaintiff's right to associate with others who share her political beliefs by foreclosing her from voting at the September 9, 1975 primary. No act or conduct of plaintiff herself has resulted in the deprivation of that right, except the lack of the eleven-month durational residence. Unlike the plaintiff in *Rosario*, plaintiff here did not lose her right to enroll by her own neglect. Upon resumption of her residence in New York some three months after the deadline for enrollment expired, there was no way under New York law that she could have enrolled so as to be eligible to vote in the September 9, 1975 primary. It is the application of section 186 alone that bars her from voting.

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[10] Bullock v. Carter, 405 U.S. 134, 146-47 (1972); Terry v. Adams, 345 U.S. 461, 469-70 (1953); United States v. Classic, 313 U.S. 299, 314 (1941).

[11] Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973).

[12] Rosario v. Rockefeller, 410 U.S. 752, 761 (1973).

The initial question is whether section 186 is to be tested by the rational basis standard or by a more stringent standard of review.[13] Since the statute effectively deprives plaintiff of the right to participate in the ensuing primary election and to associate with others for the common advancement of their political views and beliefs, the statute is subject to a rigid standard of review and at a minimum must be "found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."[14] In other words, is the eleven-month minimum residence requirement that is imposed upon plaintiff as a newly established resident of the State of New York before she is eligible to voice her preference in her party's primary election "necessary to promote a compelling governmental interest"?[15]

The state justifies its law as reasonable in order to assure the integrity of the electoral process, essentially by preventing "raiding" or "crossing over" by members of one political party to another primarily for the purpose of affecting the results in the raided party so as to weaken its candidates at the general election. There can be no question that this is a valid purpose and that the prevention of "raiding" reflects a compelling state interest.[16] However, recognizing that important interest does not resolve the

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[13] Bullock v. Carter, 405 U.S. 134, 142-143 (1972).

[14] Id. at p. 144.

[15] Dunn v. Blumstein, 405 U.S. 330, 342 (1972). The formulation of the strict scrutiny test in *Dunn* differs somewhat from that in *Bullock* quoted immediately above in its insistence that the state's interest be a compelling one, and seems to be the most widely accepted view of the standard the Supreme Court has attempted to enunciate. Whether this standard or the standard announced in *Bullock* is the correct one, however, the end result here is the same.

[16] Rosario v. Rockefeller, 458 F.2d 650, 652 (1972), *aff'd*, 410 U.S. 752 (1973).

constitutional issue; in the protection of that interest the state "cannot choose means that unnecessarily burden or restrict constitutionally protected activity."[17] Thus, inquiry is directed to whether section 186 is necessary to protect the state's interest insofar as it applies to out-of-staters who establish residency in New York after the cutoff date for enrollment.

First, the New York State Court of Appeals, in holding unconstitutional the three months' durational residence requirement (as distinguished from a bona fide residency requirement) imposed under the state's constitution and section 150 of the Election Law, recognized that a lesser period, not exceeding thirty days, was adequate to protect the state's interest in preventing voter fraud.[18] Thus an adequate investigatory period eliminates the danger that large groups of non-New Yorkers will invade the state just to vote in one of its primary contests. Furthermore, it is unrealistic to assume that many out-of-state persons will undertake the expense and suffer the inconvenience of moving to and establishing residency in New York simply so that they may raid a party's primary elections. Finally, it is unlikely that party organizers can build successful raiding campaigns from among those who have recently moved to the state for reasons unrelated to raiding. Such new arrivals, on the whole, will have an interest in local politics somewhat less partisan than those of more established residents. Experience suggests that, to the extent raiding occurs, raiders are more likely to be long time members of the conspiring party[19] than new arrivals who have yet to

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[17] Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[18] Atkin v. Onondaga County Bd. of Elections, 30 N.Y.2d 401 (1972).

[19] *See, e.g.*, Zuckman v. Donahue, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct.), *modified*, 274 App. Div. 216, 80 N.Y.S.2d 698, *aff'd mem.*, 298 N.Y. 627, 81 N.E.2d 371 (1948); Werbel v. Gernstein, 191 Misc. 275, 78 N.Y.S. 440 (Sup. Ct.), *aff'd*, 273 App. Div. 917, 78 N.Y.S.2d 926 (1948).

establish a political affiliation in New York State. Under the circumstances, any alleged deterrent force of section 186 with respect to plaintiff is illusory and the time factor thereunder which deprives her of the right to vote in the primary is far beyond what is reasonably required to achieve that purpose.

Neither can the eleven-month waiting period be justified on the ground of administrative necessity. In *Dunn* v. *Blumstein*[20] the Supreme Court observed that thirty days appeared to be ample time to complete whatever administrative tasks are necessary to prevent fraud, and a year or three months too much. In *Burns* v. *Fortson* the Court in upholding Georgia's statute closing voter registration fifty days prior to election day as necessary "to promote orderly, accurate and efficient administration of state and local elections" nonetheless cautioned that "the 50-day registration period approaches the outer constitutional limits in this area."[21]

This Court therefore concludes that section 186, as applied to persons who move to New York State after the cutoff date for enrollment, is not necessary to effect the compelling state interest of preventing raiding of primary elections or to promote administrative efficiency. The law operates most harshly against exactly the group of persons who present the least danger of engaging in the conduct that the statute seeks to prevent. Such imprecisely drawn legislation does not pass constitutional muster under the exacting standards that must be applied to preserve the constitutional rights at issue here. It impermissibly deprives a substantial number of qualified voters from participating in the primary election of their designated party; it penalizes those persons who have traveled from

[20] 405 U.S. 330, 348 (1972).

[21] 410 U.S. 686, 686-87 (1973).

one place to another to establish a new residence; it discriminates against them and in favor of long-time residents of the state by denying them the opportunity to participate in a primary election and to associate with those who share their political views.[22]

There remains for final consideration plaintiff's motion for class action determination pursuant to Rule 23(b)(2). Certification would appear unnecessary in the light of *Vulcan Society of New York City Fire Department, Inc.* v.

[22] The state urges that principles of *stare decisis* and collateral estoppel require dismissal of plaintiff's complaint. This contention is without substance. Entirely apart from the fact that plaintiff was not a party to any of the cases upon which the state relies, each cited case is distinguishable from the facts in the instant case. Ortner v. Board of Elections, Dkt. No. 74 Civ. 3416 (S.D.N.Y. Sept. 9, 1974) (unreported), was a decision of a divided three-judge panel issued orally on the day before the 1974 primary elections were held. Neale v. Hayduk, 35 N.Y.2d 182, 316 N.E.2d 861, 359 N.Y.S.2d 542 (1974), *appeal dismissed*, —— U.S. —— (1975), was a 4-3 decision of the New York Court of Appeals based largely on the proposition that the particular means chosen by the state to implement its compelling interest need only be reasonable. Hansen v. Board of Inspectors, Dkt. No. 12410 (Sup. Ct. June 26, 1973), *aff'd*, App. Div. 2d 45, 988, *appeal dismissed*, —— U.S. —— (1975), was a summary dismissal of an election-day challenge brought before a State Supreme Court justice which contained no discussion of the merits of plaintiff's claim.

Importantly, none of these cases involved nonresidents, but the claims of New York residents who had moved from one county to another. Although these plaintiffs also faced the absolute bar of section 186, and similarly did not fall within the special exceptions of section 187 (*see* note 4 *supra*), the claims of those who have been and continue to be New York residents may present problems different from those posed by nonresidents. Interestingly, the only case to consider the exact issue raised in this case also found section 186 unconstitutional as applied. Avrudick v. Wilson, 382 F. Supp. 984 (S.D.N.Y. 1974), *vacated by stipulation*, Dkt. No. 74-2432 (2d Cir. August 12, 1975). Even were the three cases the state cites indistinguishable from the case at bar, this Court would not hesitate to grant plaintiff the relief she seeks absent an authoritative declaration of a higher court.

Civil Service Commission.[23] However, at a further hearing following original argument of this matter, the state's representative did not give definite assurance that in the event plaintiff's position were upheld and the statute as applied to plaintiff declared unconstitutional, the state would accord to those in the same class as plaintiff the benefits of the declaratory judgment in her favor.

Sections 186 and 187 have been the subject of substantial and time-consuming litigation in the federal and state courts. As already noted, the Supreme Court in *Rosario* did not reach the issue here presented since plaintiffs in that action did not have standing to raise it. The issue is a recurring one and should be definitely set to rest one way or the other. It has been suggested that defendants may attempt to moot plaintiff's claim by the expedient of allowing her to vote in the September primary.[24] But even so the issue will remain as to others in her class. Those voters similarly situated as plaintiff and newly arrived residents otherwise qualified, who are deprived of the right to vote in this or future primary elections under the same circumstances as plaintiff, are also aggrieved by the statute enforced by the state and now found unconstitutional. The fact that plaintiff prevails upon her claim for declaratory relief does not eliminate the claims of those, similarly situated, on whose behalf plaintiff also commenced this action.

The state opposes class action certification. It is difficult to fathom the basis of its opposition in the light of the time-consuming litigations in both the federal and state courts. In any event, there can be no question that the requirement of a class action as defined in Rule 23(b)(2),

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[23] 490 F.2d 387, 399-400 (2d Cir. 1973).

[24] *Cf.* Sosna v. Iowa, 419 U.S. 393 (1975). *But cf.* Super Tire Eng. Co. v. McCorkle, 416 U.S. 115, 126 (1974), and cases cited therein.

to wit, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole * * *," is fully satisfied, as are the other prerequisites under the Rule.

The vigor with which plaintiff's counsel has litigated this and other actions attacking the constitutionality of sections 186 and 187 gives full assurance that the interests of the class will be adequately protected.

Motion for class action determination is granted. A declaratory judgment may be entered declaring sections 186 and 187 unconstitutional as applied to plaintiff and the class members.

Dated: New York, N. Y.
August 29, 1975

EDWARD WEINFELD
United States District Judge